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IN THE

Supreme Court of the United States

October Term, 1953

No. 64

ODOM FARRELL SULLIVAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on April 9, 1954 (R. 106-107), based on an opinion of said court rendered on April 9, 1954 (R. 101), affirming the judgment and order of the United States District Court for the District of Kansas. The opinion is not as yet officially reported but may be found at page 101 of the record. The order and judgment of the District Court is unreported but appears at page 89 of the record.

JURISDICTION

The opinion was promulgated on April 9, 1954 (R. 101) and the judgment of the court below was entered on April 9, 1954 (R. 106-107). The jurisdiction of this court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether the indictments in these cases should have been dismissed by the District Court on the ground that the orderly procedure required by law was not followed by the United States Attorney in presenting these cases to the Grand Jury and whether the Grand Jury proceedings were irregular and unlawful because the Attorney General of the United States had not directed that the cases be presented to the Grand Jury as required by Executive Order No. 6166, Section 5; Section 3740, Title 26 of the United States Code and as provided by Circular Letter No. 2431 dated August 10, 1933 addressed to "All United States Attorneys", issued by the Attorney General of the United States in compliance with said Executive Order.

2. Whether the District Court erred in refusing to grant petitioner's motion and amended motion to permit petitioner to withdraw his plea of nolo contendere and to set aside the judgment of conviction entered in the case.

STATUTES AND EXECUTIVE ORDERS INVOLVED

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) provides as follows:

> "The functions of prosecuting in the courts of the United States claims and demands by and offenses against, the Government of the United States, and of

defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

Section 3740, Title 26 of the Internal Revenue Code and the United States Code provides:

"AUTHORIZATION TO COMMENCE SUIT

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. 53 Stat. 460."

Section 3761, Title 26 of the Internal Revenue Code and United States Code provides:

> "COMPROMISES—(a) AUTHORIZATION.
> "The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. may be found at page 17 of the Appendix, *infra*.

Section 145, Title 26, United States Code and Internal Revenue Code, may be found at page 17 of the Appendix, *infra*.

STATEMENT OF THE CASE

On January 31, 1952, Llewellyn A. Luce, of counsel for the petitioner, was advised as follows, by the Acting Assistant Attorney General (R. 25):

"United States
Department of Justice
Washington 25, D. C.
January 31, 1952

"ENS:BK:11
5-29-387

"Llewellyn A. Luce, Esq.,
937 Munsey Building
Washington 4, D. C.

RE: O. F. Sullivan,
Central Theatre Co., Inc.
Wichita, Kansas.

"Dear Mr. Luce:

"We have on file your request that a conference be granted you in the event the above-named case is

referred to this office with the recommendation for criminal prosecution.

"This is to advise that we are now in receipt of a recommendation by Acting Regional Counsel Joseph B. King that criminal proceedings be instituted against O. F. Sullivan for individual income tax evasion as to the years 1946, 1947 and 1948, and for corporate evasion as to the year 1946.

"This case has been assigned to Mr. Ben Kohler, Jr., of my staff. In view of the fact that the first year involved is 1946 a conference in this matter cannot be held until after the present March 15th statutory deadline. As soon as possible after March 15th, however, a conference date will be proposed.

Sincerely yours,

For the Attorney General,
ELLIS N. SLACK,
Acting Assistant Attorney General."

On February 28, 1952, and while the cases of the petitioner and Central Theatre Co., Inc. were under consideration by the Attorney General of the United States in Washington, D. C. and before March 15, 1953 referred to in the letter from the Assistant Attorney General above quoted (R. 25-26), two indictments were returned against the petitioner by a Grand Jury in the District of Kansas impaneled at Topeka, Kansas (R. 1-3).

The first indictment, Case No. 8751, consisted of four counts and charged the petitioner under Title 26, United States Code, Section 145 (b), with having willfully and knowingly filed false and fraudulent Federal income tax returns for the calendar years 1945, 1946, 1947 and 1948, with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 1-3).

The second indictment, Case No. 8752, consisted of two counts and charged the petitioner under Title 26, United States Code, Section 145 (b), with having will-

fully and knowingly filed or caused to be filed false and fraudulent Federal income tax returns for the calendar years 1945 and 1946 of Central Theatre Company, Inc. with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 3-4).

On September 8, 1952, the petitioner was arraigned in the United States District Court for the District of Kansas in both cases and entered his plea of "not guilty" as charged in the counts of the two indictments (R. 4).

On August 12, 1952 petitioner filed motions to dismiss the two indictments on the ground that the cases were not presented to the Grand Jury pursuant to the direction of the Attorney General of the United States, as required by Executive Order No. 6166, Section 5; Circular Letter addressed on August 10, 1933 to "All United States Attorneys" issued for the Attorney General of the United States in compliance with said Executive Order, and Section 3740, Title 26 of the Internal Revenue Code (United States Code) (R. 23-24).

The motions to dismiss were denied by the District Court by letter to the clerk of the court (R. 91) and the cases were set for trial during April, 1953 (R. 91).

On April 6, 1953 a jury was impaneled and sworn to try both cases.

On April 8, 1953, the petitioner with his counsel being personally present, moved to withdraw the pleas of not guilty previously entered as to all six counts in the two indictments and tendered to the court pleas of *nolo contendere* to counts one and three in Case No. 8751 and tendered the same plea to count one in Case No. 8752. Whereupon, the court, being advised by the United States Attorney that he acquiesced in and had no opposition to the acceptance by the court of such pleas, accepted the

pleas of *nolo contendere* as above specified. (R. 26-27) At that time the United States Attorney, with the consent of the Attorney General, moved to dismiss the remaining three counts, which motion was sustained by the court. The court then ordered a presentence investigation to be made and set the sentence hearing for May 5, 1953, which was later continued to May 26, 1953 (R. 91).

On May 26, 1953 the petitioner was adjudged and committed by the District Court as follows (R. 42):

> "It is adjudged that the defendant is guilty as charged and convicted.
>
> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for the imprisonment for a period of three (3) years on count 1, to run concurrently with the sentence this date imposed on count one of Case No. 8751, and pay a fine in the sum of $8,000.00 and the costs of this action.
>
> "It is adjudged that count 2 is dismissed on motion of the United States Attorney. Stay of execution is granted for 30 days."

On May 29, 1953 petitioner filed with the District Court a motion to set aside judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* (R. 43), pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure.

On May 29, 1953, petitioner also filed a motion in arrest of judgment (R. 43).

On June 12, 1953, petitioner filed with the court an amended motion to set aside judgment of conviction and permit appellant to withdraw his plea of *nolo contendere* (R. 44-50).

On June 12, 1953, petitioner also filed a petition for probation (R. 51-57).

A statement of the facts upon which the motion and amended motion to withdraw the plea of *nolo contendere* were based may be found at page 18 of the Appendix, infra.

On June 23, 1953, a hearing was held on petitioner's motion in arrest of judgment, motions to set aside the judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* and the petition for probation (R. 92).

At the hearing of June 23, 1953, thirteen prominent citizens of Wichita, Kansas appeared, testified and recommended probation for appellant (R. 76-78).

Bert N. Morgan, a special agent of the Intelligence Unit, Bureau of Internal Revenue, also appeared, testified and was cross-examined as to the civil liabilities of appellant (R. 79-89).

At the conclusion of the hearing the District Court denied (R. 93):

Petitioner's motion in arrest of judgment;

Petitioner's motion and amended motion to set aside judgment of conviction and to permit appellant to withdraw his plea of *nolo contendere;* and,

Petitioner's petition for probation.

The petitioner thereupon duly filed notice of appeal to the United States Court of Appeals for the Tenth Circuit in both cases, Nos. 8751 and 8752 (R. 94-97, inclusive).

On August 18, 1953, petitioner filed his Statement of Points on appeal (R. 98) as follows:

1. The trial court erred in denying petitioner's motion in arrest of judgment.

2. The trial court erred in denying petitioner's motion to set aside the judgment of conviction and denying petitioner permission to withdraw his plea of *nolo contendere*.

3. The trial court erred in denying petitioner's *petition* for probation.

On April 9, 1954 the United States Court of Appeals for the Tenth Circuit rendered an opinion affirming the decision, order and judgment of the District Court (R. 101). Judgment was entered by the Court of Appeals on April 9, 1954 (R. 106).

SPECIFICATION OF ERRORS

The Honorable Circuit Court of Appeals erred:

1. In affirming the order and judgment of the District Court denying petitioner's motion to dismiss the indictments and in arrest of judgment and denying petitioner's motions to withdraw his plea of *nolo contendere* and to set aside the judgment of conviction.

2. In failing to properly apply to this case the provisions of Executive Order No. 6166 as interpreted by the Attorney General of the United States in Circular Letter No. 2431 and in holding that there was no showing by appellant that an "emergency" as mentioned in said Circular Letter did not exist at the time of the indictment.

3. In holding and deciding that Section 3740, Title 26 of the United States Code relates only to civil proceedings.

4. In failing to hold and decide that to correct "manifest" injustice the District Court should have set aside the judgment of conviction and should have permitted the appellant to withdraw his plea of "*nolo contendere*".

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court. This case involves the interpretation of an Executive Order (No. 6166) and a Federal statute, Section 3740, Title 26, U.S.C. (53 Stat. 460).

Petitioner respectfully submits that Executive Order No. 6166 should be interpreted just as the Attorney General of the United States has himself interpreted it by Circular Letter No. 2431 in which he directed United States Attorneys to present evidence to a Grand Jury concerning violations of Internal Revenue laws only when authorized to do so by the Attorney General's Office unless emergency calls for immediate action. (p. 3 this petition) The record here clearly shows that no emergency existed in this case.

The Acting Assistant Attorney General notified counsel for petitioner on January 31, 1952 that in view of the fact that the first year involved was 1946 a conference on the matter could not be held until after March 15, 1952 (R. 25-26). However, in less than one month after said notification the United States Attorney presented the evidence to a Grand Jury at Topeka, Kansas and petitioner was indicted (R. 1 and 3). The question of a violation of the Internal Revenue laws for the year 1945 was not even presented to the Attorney General for his consideration (R. 25-26).

The Executive Order and resulting Circular Letter had the force and effect of law in regard to supervision and procedure in all tax litigation. Executive orders as well as department regulations issued pursuant to statutory authorization have the force and effect of law of which the courts are bound to take cognizance. (See 54 Am. Jur., United States, Section 37, Proclamations and Executive Orders, Page 553, and cases cited therein, and

State ex rel. Kaser v. Leonard, 102 Pac. 2d 197, 129 A.L.R. 1125, which outlines the Federal cases on the subject.

Petitioner also relies on Section 3740, Title 26, U.S.C. (p. 3 this petition), which has not been construed by this Court in relation to the point involved. It is submitted that this section of the statute does not relate merely to civil actions, as the Court of Appeals held, but that it covers all tax litigation including prosecutions under Section 145(b) U.S.C. Petitioner finds no opinion of the Attorney General, regulation, ruling or circular letter limiting said section to civil proceedings.

The pertinent section of the statute uses the word "suit". The word "suit" is a comprehensive term which may be and is sometimes used to include criminal proceedings, such as an indictment or information; 1 Corpus Juris Secundum, page 962 and cases there cited. A criminal case has been defined as an action, suit or cause instituted to punish an "infraction of the criminal law". 1 Corpus Juris Secundum, p. 951.

Section 3740 also uses the words "for the recovery of • • • any fine, penalty, or forfeiture". Section 145(b) U.S.C., under which petitioner was indicted, is a penalty section for tax evasion providing both for a fine and/or imprisonment (App. p. 17). "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603; *United States v. La Franca*, 282 U.S. 568; *United States v. McKee*, 4 Dill 128.

We think that failure to strictly follow the provisions of Section 5, Executive Order No. 6166; Circular Letter No. 2431; and Section 3740, Title 26 U.S.C. would seriously impair the orderly administration of justice in

revenue cases and subject taxpayers to the whims, caprices and prejudices of minor officers in local communities. We believe that it was the intent of Congress that the sole responsibility should rest with the Attorney General (Speech of Senator Robinson of Arkansas, Congressional Record, June 10, 1933, page 5615, App. p. 23).

The decision of the Court of Appeals is not in accord with the well established principal that a defendant may be permitted to withdraw a plea of "guilty" or *nolo contendere* "to correct manifest injustice" Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.A. (App. 17).

In his verified amended motion to withdraw his plea, petitioner stated that although innocent he entered his plea of *nolo contendere* because he was led to believe and did believe that under such a plea he would receive a substantial fine and suspended sentence and be placed upon probation (R. 44). A full statement of the facts, outlining the events and describing the conferences between counsel for petitioner and the United States Attorney which led to the entry of the plea may be found at pages 18-23 of Appendix, *infra*.

In *Kercheval v. United States*, 274 U.S. 220, 224, 71 L. Ed. 1009, 1012, this Court observed:

> "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

There is no question in this case but that the petitioner was advised by his three attorneys (who took part in the conferences with the United States Attorney) to enter the plea of *nolo contendere* (R. 62).

A pronouncement by Mr. Justice Frankfurter in a concurring note in *Von Moltke v. Gillies*, 332 U.S. 708, 729, is that while an accused, with the considered appro-

val of the court, may competently and intelligently waive a right guaranteed by the Constitution—

> "There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered • • • a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences."

"• • • The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty • • •." 14 American Jurisprudence, Section 287, pp. 961-962; *United States v. William G. Lias*, 173 F. (2d) 685 (CA 4).

In *Bergen v. United States* (C.C.A. 8, 1944), 145 F. (2d) 181, 187, the United States Court of Appeals stated:

> "We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty."

Judge Riddick, speaking for the court in the *Bergen* case, noted also that:

> "The court's discretion should be *exercised liberally* • • •" (Page 187) (Italics ours.)

One of the fundamental questions involved under this issue is:

> "Was the appellant misled?"
> "It is immaterial whether the misleading was intentionally or unintentionally done."

"The material inquiry is: Was the defendant misled, or under a misapprehension, at the time he entered his plea?"

State v. Hovis (1944),
353 Mo. 602, 183 S.W. 2d 147.

In *State v. Hovis, supra,* the Missouri Supreme Court observed:

"We do not mean to say that we think the prosecuting attorney intentionally misled the appellant, but we do think that he was misled. *The question before us is: was the appellant misled? It is immaterial whether the misleading was intentionally or unintentionally done. The material inquiry is: Was the defendant misled, or under a misapprehension,* at the time he entered his plea of guilty? While it may be true, as stated by the prosecuting attorney that he did not in so many words tell defendant that if he would make a confession that he would be paroled, yet we think the statements made by the prosecutor to the defendant were such as did cause him to believe that he would be paroled if he entered a plea of guilty" (Italics ours).

See also *United States v. Western Chemical & Mfg. Co.,* 78 F. Supp. 983.

We think that the decision of the Court of Appeals fails to follow the principles enunciated by this Court in *Kercheval v. United States,* supra, and *Von Moltke v. Gillies,* supra; also that the decision of the court below conflicts with the decisions of the Eighth and Fourth Circuits in *Bergen v. United States,* supra, and *United States v. Lias,* supra.

The determination by the petitioner Sullivan to plead *nolo contendere* involved a waiver by him of his constitutional right to a trial by jury guaranteed by Article III, Section 2 of the Constitution of the United States and by the Sixth Amendment to that Constitution. He asks only

as a matter of simple justice to be permitted to withdraw the plea.

In *United States v. Lias,* supra, the Court of Appeals quoted from the memorandum of the District Court Judge, permitting the defendant to withdraw his plea of guilty. As observed by the District Court Judge, "• • • The only thing that the government has lost is a comparatively short time in which a trial might have been held. That trial can still be held. No one will be in a worse position in this case because of this action, unless it is defendant himself, the party at whose instance it is being taken."

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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TOM HARLEY, JR.
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Counsel for Petitioner.

CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE
WALTER H. MALONEY

APPENDIX

Rule 32 (d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides as follows:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea".

Section 145, Title 26, United States Code and Internal Revenue Code provides:

> "Sec. 145. Penalties.
>
> "(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> "(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law,

be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Statement of Facts upon which the Motion and Amended Motion to Withdraw the Plea of Nolo Contendere Were Based.

The cases had been set for April 5, 1953, for the impaneling of a jury and for trial for April 14th (R. 59). On the night of April 5th, Mr. Luce arrived in the City of Wichita and was met at the station by Mr. Harley; both of them going to the Lassen Hotel where Mr. Luce had reservations. Mr. Luce and Mr. Harley were in Mr. Luce's room for only a few minutes when they received a telephone call from Mr. Davis, the United States District Attorney, inviting them down to his room, which invitation was accepted (R. 59 and 64).

On the morning of April 6th, a jury was selected, impaneled, sworn and excused to return April 14th for the trial of the cases (R. 64).

On the night of April 6th, Mr. Davis called Mr. Luce and invited him and Mr. Harley down to his room. Mr. Luce informed Mr. Davis that he and Mr. Harley were in conference with their client and witnesses and wouldn't be able to accept the invitation. Approximately forty-five minutes later, Mr. Davis again called and renewed his invitation, which was accepted (R. 64). Mr. Luce and Mr. Harley were met by Mr. Davis and Mr. Bingham, an Assistant United States District Attorney. After some conversation, Mr. Davis asked Mr. Luce and Mr. Harley why they didn't settle the cases by pleading the defendant guilty to one count of each indictment, to which Mr. Harley replied that the defendant would not plead guilty to any count because the defendant maintained and insisted that he was not guilty of any fraudulent conduct (R. 60 and 64).

Mr. Bingham was of the opinion that the defendant should plead to three counts and asked if the defendant would enter a plea of *nolo contendere* to three counts of the two indictments (R. 64). During the discussion as to whether the defendant should and would enter a plea of *nolo contendere* to three counts of the indictments, Mr. Bingham informed Mr. Luce and Mr. Harley that he thought the defendant was subject to Berger's disease, that according to their information the defendant's brother had died of the disease, that his sister had to have a leg amputated because of the disease and that he was of the opinion the court would be lenient with anyone of the character and reputation of this defendant who had a medical background such as that (R. 60). Mr. Davis stated that he had nothing personal against the defendant and that he was of the opinion that the court would show leniency to a man of defendant's character and reputation (R. 60 and 65).

After more conversation of like tenor, Mr. Davis was asked by Mr. Harley if he would recommend probation or suspended sentence in the event said defendant should enter pleas of *nolo contendere* (R. 60). Mr. Davis stated that it was not the practice of the court to ask him for a recommendation but that he had no objection to probation or suspended sentence and to be assured that he would not oppose probation or suspended sentence (R. 61).

The major dispute as to what transpired in the conferences the night of April 6th and the night of April 7th is whether Mr. Davis stated that he had no objection to probation or suspended sentence and would not object to probation or suspended sentence. Mr. Luce in his affidavit states that such a statement was made (R. 60). Mr. Jochems in his affidavit states that Mr. Davis stated that he would not oppose probation or suspended sentence (R. 58). Mr. Harley states in his affidavit that

such a statement was made (R. 61). Mr. Bingham in his affidavit states that no such statement was made (R. 73). Mr. Davis in his affidavit states that he recalls making no such statement but that he did state that he "did not propose to take a position one way or the other, and hoped that the court would not ask him" (R. 72).

On the morning of April 7th a conference was had between Mr. Davis and Mr. Bingham and counsel for defendant as to whether the Department of Justice would approve the suggested settlement (R. 66). In the afternoon of the same day Mr. Luce and Mr. Jochems conferred with Mr. Davis and they went into the chambers of Judge Hill to ascertain whether His Honor would accept a plea of *nolo contendere*. While in his chambers, Judge Hill inquired about civil liabilities and stated in substance that even in cases where defendant pleaded guilty and was placed on probation he always made it plain that the plea was entered without prejudice to defendant's right to dispose of his civil liabilities (R. 58 and 66).

All of the aforesaid facts were related to the defendant and after lengthy discussion, at approximately 12 o'clock midnight, the defendant reluctantly agreed to enter a plea of *nolo contendere* to the three counts after being advised by counsel that they were satisfied in their own minds that both Mr. Davis and Mr. Bingham were sincere in everything they had said and that they felt from their conversations that Mr. Davis and Mr. Bingham actually favored said defendant receiving probation or suspended sentence (R. 62).

The following day, April 8th, the defendant entered pleas of *nolo contendere* to Count One and Count Three in Case No. 8751 and upon motion of the Government Counts Two and Four were dismissed. Defendant also entered a plea of *nolo condentere* to Count One of

Case No. 8752 and upon motion of the Government Count Two was dismissed. The cases were then passed for pre-sentence investigation.

On the 26th day of May, 1953, the cases came on to be heard for sentencing of the defendant, at which time Mr. Davis was asked by the court if he desired to make a statement, to which Mr. Davis replied that, perhaps, he should (R. 28).

Mr. Davis got up to make his statement and his former friendly attitude toward the defendant changed from one of friendliness and consideration to one of vindictiveness which is hard to observe from the printed word.

In Mr. Davis' statement to the court (R. 28 to 32, incl.) he not only discussed the counts to which a plea had been entered but he went into detail as to the counts which had been dismissed by the Government (R. 29).

In addition to discussing the counts of the indictments which had been dismissed, Mr. Davis went into detail relative to the claimed civil liabilities of the defendant for the years 1941 to 1948 inclusive. For the year 1948, which is Count Four of the indictment in Case No. 8751 and which had been dismissed by the Government, Mr. Davis stated the income of the defendant for that year to be $138,000.00 (R. 30). Said count alleges the actual income of the defendant to be $82,027.15 (R. 2). The amount of $138,000.00 is the amount claimed by the Government as defendant's civil tax liability and is far in excess of the amount claimed by the Government in the criminal case. In Mr. Davis' statement for said year he not only discussed an amount in excess of the amount stated in the indictment but he discussed at some length the fact that such a large amount of income had not been reported for said year (R. 30).

Mr. Davis stated the corporate deficiency to be $57,679.29 (R. 34) whereas the deficiency claimed in both counts of the indictment, one of which had been dismissed, was $5,578.07 (R. 3). He also stated the personal deficiency of the defendant to be $186,899.62 (R. 34) when as a matter of fact all of the counts in Case No. 8751, two of which had been dismissed, only show a claimed deficiency of $52,949.20 (R. 1). In addition to claimed deficiencies for income taxes, Mr. Davis stated the defendant owed $17,422.51 in gift taxes (R. 34). There had never been any indication or claim that the defendant owed any gift taxes nor were they involved in the present action.

Mr. Davis further informed the court that, according to the Agent's report, it was a "painstaking, teeth-puiling, type of endeavor" to obtain the facts (R. 32). That the defendant obtained "skim-offs" from the Civic (R. 32) and Central Theatres (R. 32) He stressed the various bank accounts of the defendant (R. 33 and 34).

At the time of making his statement to the court, Mr. Davis was reading from the report of the Agent, Mr. Walker, who was then dead (R. 33). At the time of Agent Walker's death he was no longer with the Bureau and was charged with kidnapping and robbery in the District Court of Sedgwick County, Kansas.

Mr. Davis in his statement used the amounts claimed to be owed by the defendant in the audit made by the Special Agent's Office for the years 1941 to 1948, inclusive (R. 81). The amounts of these claimed civil liabilities were unknown to the defendant at this time (R. 35) and as stated by Mr. Morgan in his cross-examination it is not the policy of the Bureau to inform the defendant of his civil liabilities when there is a possibility of criminal action being brought (R. 83).

Mr. Davis stated that "• • • the Government feels that it has figures to establish that there was unreported income of the terrific total of $319,000.00 and a deficiency

in tax for those particular years of $186,000.00" (R. 31). These figures and amounts were even questionable in the mind of the Special Agent, Mr. Morgan. Mr. Morgan in his cross-examination by Mr. Luce stated that their figures for the years 1941 to 1945, inclusive, were not computed on the net worth basis and asked Mr. Luce to define net worth; that the figures computed for said years were on a hybrid system (R. 84). Mr. Morgan further testified that for the year 1948 the report does not recognize the sale of the Enid properties as capital gain; that there might be a difference of opinion in determining net worth adjustment and questions of law (R. 87). Mr. Morgan also testified that the defendant had not been notified as to any gift tax liability (R. 88).

It is perfectly true that Mr. Davis did not in so many words recommend to Judge Hill any sentence that the defendant should receive but in his statement to the court he said everything that he could possibly say to prejudice the court against this defendant. (R. 31)

The sentence of the Court followed (R. 42). Thereafter the petitioner filed his motions to withdraw the plea.

Speech of Sen. Robinson, of Arkansas, in the Congressional Record for June 10, 1933, on Page 5615:

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> "The fifth feature of the Executive Order has to do with claims by or against the United States. The responsibility of prosecuting and defending the suits in which the United States is a party, is governed by a multiplicity of laws which are a maze of conflicting and anomalous provisions. District Attorneys and Marshalls are responsible to the Attorney General. Nevertheless, certain agencies of the Government have the right to issue binding instructions to Attorneys and Marshals regarding the prosecution of suits. The Solicitor of the Treasury, who is in point of law a subordinate of the Attorney General, has the anomalous authority of final decision in certain mat-

ters without respect to the judgment of the Attorney General. It was clearly the intent of the law creating the Department of Justice that the Attorney General should have responsibility for prosecuting and defending suits to which the United States is a party, and the whole conflict comes from failure to properly amend antecedent laws.

"The order gives effect to the legislative intent respecting the Department of Justice and centers in the Attorney General the sole responsibility for the conduct of suits. The order in no wise diminishes the present authority of the various departments in respect to controversies before they get into the courts, but it provides that, once the Attorney General is called upon to act in the matter, thereafter his judgment is to be conclusive. This is highly desirable from the standpoint of sound organization and it will be productive, perhaps not of saving any actual expense, but of savings due to bettering the administration of court matters."